STATE OF MICHIGAN

COURT OF APPEALS

RODERICK L. DUNBAR,

Plaintiff-Appellant,

v

YORK INTERNATIONAL CORPORATION,

Defendant-Appellee.

UNPUBLISHED
August 22, 2006

No. 268963
Oakland Circuit Court
LC No. 2005-066342-CZ

Before: Saad, P.J., and Jansen and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from a trial court order granting defendant's motion for summary disposition, which was brought pursuant to MCR 2.116(C)(1) and (10). The court dismissed plaintiff's claims for breach of contract and racial discrimination, finding that it lacked jurisdiction in light of the collective bargaining agreement (CBA) that governed plaintiff's employment. We affirm, albeit for different reasons than those employed by the trial court.

Plaintiff was a member of Pipefitters Union Local 636, which had a "hiring hall arrangement" with defendant. The CBA governed defendant's employment of union members. Plaintiff completed an application for employment with defendant on September 7, 2004. In the application, plaintiff agreed that successfully passing a drug screen was a condition of beginning his employment. Plaintiff also acknowledged receiving a copy of defendant's "General Company Rules and Safety Guidelines."

Drug test results indicated that plaintiff tested positive for cocaine. Plaintiff was informed of the results in a memorandum dated September 24, 2004, which also advised plaintiff that the "conditional offer of employment ha[d] been revoked" in accordance with company policy. Plaintiff alleges that he requested a retest of his sample and was told by a supervisor that he needed to pay for the retest, so he submitted a money order for the amount. In March 2005, defendant informed plaintiff that he was not entitled to a retest and that his money order would be returned. Plaintiff's union filed a grievance, but ultimately the international representative concluded that defendant was in compliance with its drug and alcohol testing policies.

The CBA did not include a specific drug testing policy, but authorized the local unions and the employer to implement one.[1] Defendant adopted two policies: (1) Policy No. 2105, entitled "Drug and Alcohol Policy," and (2) Policy No. 2155, entitled "Drug and Alcohol Testing Procedure." Both distinguish between testing of "applicants" and testing of "employees." Policy No. 2105.30 indicates that testing of applicants will use hair samples, except in specified states, and that testing of employees will use urinalysis, unless a urine sample could not be collected. With respect to positive test results and retesting, Policy No. 2105.50 states in pertinent part:

> An employee who tests positive shall be informed in writing of the identity of the drug(s) for which s/he tested positive and the right to have that same sample retested. The employee shall pay for the cost of such additional testing in advance via money order or cashiers' check.
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> An applicant who tests positive for illegal drugs shall be informed in writing that the employment offer has been rescinded. The letter will also include notification of any rights of appeal/retesting the applicant may have pursuant to state law.

As in Policy No. 2105, Policy No. 2155 indicates that "Field Service Technician applicant drug testing shall be by hair sample," except in specified states, and that "Field Service Technician employee drug testing shall be by urinalysis." With respect to drug retesting, Policy No. 2155.70 states in relevant part:

> A Field Service Technician applicant who tests positive for drugs is not eligible to request a retest, except as required by state law in the following states: **Iowa; Maryland; Minnesota; North Carolina; and Oklahoma.**

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[1] Article 10, ¶ 29, of the CBA states:

> The parties to this Agreement recognize the need to provide a drug-free and alcohol-free workplace. Therefore, if the local union, in the jurisdiction where the Employer is performing work, has in place a negotiated drug and alcohol policy with the recognized contractor group which is consistent with the model plan recommended by the United Association/Mechanical Contractors Association of America, Inc. ("MCAA") (see Appendix to this Agreement), this policy shall apply. Where the local union has no drug and alcohol policy in effect in the jurisdiction where the Employer is performing work, or where the policy is not consistent with the UA/MCAA model drug policy, the Employer may implement a drug and alcohol policy consistent with the model plan recommended by the UA/MCAA. A copy of any drug and alcohol policy, including testing procedures, shall be furnished to the local union in the jurisdiction where the Employer is performing work.

> A Field Service Technician who tests positive for drugs shall be informed, in writing, of the identity of the drug(s) for which he or she tested positive and that he or she has the right to request, within seven (7) work days of the date of notification, that his or her specimen be retested. [Emphasis in original.]

Plaintiff's complaint quotes the provisions of Policy No. 2105.50 that pertain to *employees*. Plaintiff's complaint alleges that defendant's actions "are contrary to Defendant's policies and Plaintiff's legitimate expectations arising out of Defendant's policies," and that defendant's actions "were motivated in part because of Plaintiff's race in violation of the Elliott-Larsen Civil Rights Act." MCL 37.2101 *et seq.*

Defendant filed a motion for summary disposition, arguing in part that the trial court lacked jurisdiction over plaintiff's breach of contract claim because it was preempted by § 301 of the Labor Management Relations Act (LMRA), 29 USC 185(a). Defendant maintained that "plaintiff's claim inherently asks this court to interpret the terms and conditions of the Collective Bargaining Agreement and the policies decided thereunder," and that the interpretation of a CBA is exclusively within the jurisdiction of a federal court. In response, plaintiff argued that defendant had not shown that his claims required interpretation of the CBA.

The trial court concluded that it lacked jurisdiction with respect to both claims and granted defendant's motion for summary disposition. Although defendant's motion cited MCR 2.116(C)(1), the applicable subrule is MCR 2.116(C)(4), which applies where "[t]he court lacks jurisdiction of the subject matter." This Court will treat defendant's motion with respect to jurisdiction and the court's subsequent ruling as if the motion were brought under MCR 2.116(C)(4). See *Ellsworth v Highland Lakes Dev Assoc*, 198 Mich App 55, 57-58; 498 NW2d 5 (1993). This Court reviews de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(4). *Manning v Amerman*, 229 Mich App 608, 610; 582 NW2d 539 (1998).

As the parties recognize, state-law claims that are inextricably intertwined with consideration of the terms of a labor agreement are preempted by § 301 of the LMRA. *Allis-Chalmers Corp v Lueck*, 471 US 202, 220; 105 S Ct 1904; 85 L Ed 2d 206 (1985). Application of state law is preempted "only if such application requires the interpretation of a collective bargaining agreement." *Lingle v Norge Div of Magic Chef, Inc*, 486 US 399, 413; 108 S Ct 1877; 100 L Ed 2d 410 (1988); see also *Betty v Brooks & Perkins*, 446 Mich 270; 521 NW2d 518 (1994).

It appears that the trial court mistakenly believed that the provisions of defendant's Policy Nos. 2105 and 2155 were part of the collective bargaining agreement itself. For example, the court stated that "[t]he collective bargaining agreement does not permit a re-test except in Iowa, Maryland, Minnesota, North Carolina and Oklahoma . . . ." The court also stated that [i]n the case at bar, Plaintiff claims the collective bargaining agreement grants him the right to a re-test."

Although plaintiff's breach of contract claim required interpretation of defendant's Policy Nos. 2105 and 2155, it is not clear that these policies were part of, or equivalent to, the CBA for purposes of assessing preemption. Neither party addresses this point or provides any authorities that are useful in deciding the issue.

The trial court's dismissal of the discrimination claim on the basis of lack of jurisdiction is problematic as well. Defendant did not seek dismissal of that claim on this basis. Indeed, defendant acknowledged at the hearing on the motion that it was not requesting dismissal of the discrimination claim on the basis of lack of jurisdiction. In *Betty, supra*, our Supreme Court held that a plaintiff's discrimination claim was not preempted by § 301 of the LMRA. The Supreme Court's reasoning in that case is equally applicable here. Under the circumstances, defendant did not establish that it was entitled to summary disposition on the basis of federal preemption under § 301 of the LMRA.

However, we conclude that summary disposition of plaintiff's claims was nonetheless warranted under MCR 2.116(C)(10).

In its motion for summary disposition, defendant argued that plaintiff had not shown any statements or promises by defendant that would reasonably instill a legitimate expectation to a retest or continued employment. "[C]ompany policies and procedures may become an enforceable part of an employment relationship if such policies and procedures instill legitimate expectations of job security in employees." *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 384; 563 NW2d 23 (1997). However, plaintiff's assertion that defendant's policy required defendant to retest his sample is flawed.

Both Policy No. 2105, on which plaintiff relies, and Policy No. 2155, on which defendant relies, distinguish between the testing of "applicants" and "employees." Specifically, retesting is only available for "employees." Plaintiff attempts to characterize himself as an employee on the basis that defendant allowed him to work before the drug test results were available. But regardless of plaintiff's status for other purposes, he was an "applicant" for purposes of these policies. Plaintiff acknowledges in his complaint that the drug testing was conducted in connection with his initial application for employment. Even the type of testing performed, using a hair sample as opposed to urinalysis, indicates that plaintiff was being tested as an "applicant" and not as an "employee." There is no question that plaintiff cannot have reasonably expected a right to a retest under either of defendant's policies, both of which indicate that retesting applies only to employees and not applicants. Dismissal of plaintiff's breach of contract claim was appropriate under MCR 2.116(C)(10), because there was no genuine issue of material fact regarding a legitimate expectation of retesting under defendant's policies.

With respect to plaintiff's disparate-treatment race discrimination claim, plaintiff was required to show that he was a member of a class entitled to protection, and that for the same or similar conduct he was treated differently than a person who was a member of another race. *Betty, supra* at 281. Under the test articulated in *McDonnell Douglas v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), plaintiff had the initial burden of establishing a prima facie case of discrimination. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 133-134; 666 NW2d 186 (2003). Once a plaintiff has established a prima facie case, the burden shifts to the defendant to state a legitimate nondiscriminatory reason for the adverse employment action. *Id*. at 134. If the defendant articulates legitimate non-discriminatory reasons for the adverse employment action, the burden shifts back to the plaintiff to show that the defendant's reasons were merely a pretext for discrimination. *Id*.

Defendant, as the moving party, had the initial burden of presenting affidavits, depositions, admissions, or other documentary evidence in support of the motion for summary

disposition. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Defendant submitted a copy of plaintiff's application, plaintiff's acknowledgement of receipt of the company rules, the CBA, Policy No. 2155, plaintiff's drug test results, two memoranda to plaintiff concerning the results, and a letter concerning the grievance. The burden then shifted to plaintiff. *Id*. However, other than arguing that discovery was incomplete, plaintiff produced no evidence to support his claim.[2] On appeal, plaintiff again asserts that defendant's (C)(10) motion concerning the racial discrimination claim should have been denied as "premature." However, plaintiff's assertion that discovery was incomplete is factually incorrect, inasmuch as the trial court's ruling was made well after the close of discovery.

Even assuming *arguendo* that plaintiff had established a prima facie case, defendant presented sufficient evidence that its actions were taken pursuant to its nondiscriminatory drug-testing policies. In response, plaintiff failed to present any evidence that these drug-testing policies had been enforced in a discriminatory manner or that they constituted mere pretext for race discrimination. Because plaintiff failed to present evidence showing a disputed issue of fact concerning the pretextual nature of defendant's nondiscriminatory drug policies, defendant was entitled to summary disposition pursuant to MCR 2.116(C)(10).

The trial court reached the correct result, albeit for the wrong reasons.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen

[2] Although the discovery cut-off date was December 8, 2005, the hearing on defendant's motion did not occur until February 1, 2006. Plaintiff thus had ample time to complete discovery before the trial court's ruling.